Bell & Order Bhd v Walter Group International Building (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO S2(S1)–22–521 OF 1998
KAMALANATHAN RATNAM J
30 APRIL 2001

Civil Procedure *— Judgment and orders — Judgment in default — Setting aside — Defendant failed to file defence as directed by order of court — Blatant disregard to order of court — Plaintiff entered judgment in default for failure to file defence — Whether defendant's application to set aside judgment should be allowed*

The plaintiff filed a writ of summons and a statement of claim in 1998. A judgment in default of appearance was taken out against the defendant. This was set aside by the senior assistant registrar. The plaintiff appealed against this decision. Its appeal was dismissed and the defendant was directed to file its defence within three weeks. The plaintiff gave the defendant a notice of intention to enter judgment in default against the defendant for its failure to file its defence. The defendant filed an application for a stay of proceedings, which was dismissed. The second judgment in default was entered against the defendant for failure to file its defence. The defendant filed an application to set it aside (encl 27) and its application was successful. The plaintiff appealed.

Held, allowing the appeal:

(1) Clearly, the defendant had brought about this dilemma upon itself through its own wilful conduct in ignoring the procedural requirements. Even when the second notice to enter judgment was served on the defendant's solicitors on 14 October 1999, the defendant chose to ignore this warning. Even at this stage, it failed to apply to the court of first instance for a stay pending appeal. The defendant allowed for the judgment to be taken and then filed an application to set it aside (see p 303H–I).

(2) The defendant had been caught in an inextricable quagmire created by its own conduct in failing to take the various steps that were provided by the Rules of the High Court 1980. It had thus brought about its own downfall. There was an order of the court to file the defence within three weeks. That order had not been set aside. The prayer sought in encl 27 therefore could not stand. The defendant's attempt to justify why it chose to ignore the order of the court to file the defence was unacceptable, as the defendant, apart from merely stating that it did so to protect its right to arbitration, actually took no positive step to secure the same (see p 304D–F).

(3) The blatant disregard of an order of court, either through ignorance of the law or through wilful desire to do so, must result in the court refusing to exercise its discretion in favour of the

defaulter. Orders of court must be obeyed unless a timeous application is made to stay that order (see p 304F).

[**Bahasa Malaysia summary**

Plaintif telah memfailkan satu writ saman dan satu pernyataan tuntutan dalam tahun 1998. Satu penghakiman ingkar kehadiran telah dimulakan terhadap defendan. Ini telah diketepikan oleh penolong kanan pendaftar. Plaintif telah merayu terhadap keputusan ini. Rayuan ini telah ditolak dan defendan telah diarahkan untuk memfailkan pembelaannya dalam tempoh tiga minggu. Plaintif telah memberikan defendan satu notis berniat untuk memasuki penghakiman ingkar terhadap defendan kerana kegagalannya untuk memfailkan pembelaannya. Defendan telah memfailkan satu permohonan untuk satu penggantungan prosiding, yang telah ditolak. Penghakiman ingkar kedua telah dimasuki terhadap defendan kerana kegagalan memfailkan pembelaannya. Defendan telah memfailkan satu permohonan untuk mengetepikannya (lampiran 27) dan permohonannya berjaya. Plaintif telah membuat rayuan.

Diputuskan, membenarkan rayuan tersebut:

(1) Adalah jelas, defendan telah menyebabkan dilema ini sendiri melalui perbuatannya yang disengajakan dengan tidak menghiraukan keperluan-keperluan prosedur. Walaupun notis kedua untuk memasuki penghakiman telah disampaikan ke atas peguamcara defendan pada 14 Oktober 1999, defendan telah memilih untuk tidak menghiraukan amaran ini. Walaupun di peringkat ini, ia telah gagal untuk memohon kepada mahkamah pertamanya untuk satu penggantungan sementara mendengar rayuan. Defendan telah membenarkan penghakiman untuk diambil dan kemudian memfailkan satu permohonan untuk diketepikan (lihat ms 303H–I).

(2) Defendan telah tersepit dalam satu kancah yang beliau tidak dapat melepaskan diri oleh sebab perbuatannya sendiri kerana telah gagal untuk mengambil beberapa langkah yang diperuntukkan oleh Kaedah-Kaedah Mahkamah Tinggi 1980. Ini dengan itu telah menyebabkan kejatuhan beliau sendiri. Wujud satu perintah mahkamah untuk memfailkan pembelaan dalam tempoh tiga minggu. Perintah tersebut tidak diketepikan. Permohonan yang dipohon dalam lampiran 27 oleh itu tidak boleh dikekalkan. Percubaan defendan untuk menjustifikasikan kenapa ia memilih untuk tidak menghiraukan perintah mahkamah untuk memfailkan pembelaan tersebut tidak diterima, kerana defendan, di samping hanya menyatakan bahawa ia berbuat demikian demi melindungi hak beliau terhadap penimbangtaraan, sebenarnya tidak mengambil apa-apa langkah positif untuk menjamin yang sama (lihat ms 304D–F).

(3) Sikap tidak menghiraukan yang terang-terangan terhadap perintah mahkamah, sama ada kerana kejahilan undang-undang atau melalui niat yang disengajakan untuk berbuat demikian, mestilah mengakibatkan mahkamah enggan untuk menggunakan budi bicaranya untuk menyebelahi orang yang telah gagal untuk menghadirkan diri. Perintah-perintah mahkamah mestilah dipatuhi kecuali satu permohonan yang tepat pada waktunya telah dibuat untuk menggantung perintah tersebut (lihat ms 304F).]

Notes

For cases on judgment in default generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2763–2764.

Legislation referred to

Arbitration Act 1952 s 6

Lim Chong Fong (*Azman Davidson & Co*) for the plaintiff.
KY Wong (*Darshan Chong & Co*) for the defendant.

Kamalanathan Ratnam J:

This appeal

This is the plaintiff's appeal against the decision of the learned senior assistant registrar ('the SAR') given on 5 April 2000 setting aside the judgment in default issued by the court on 25 October 1999. On 28 February 2001, I allowed the appeal. This is the defendant's appeal against my decision.

Facts

It is important to set out the chronology of events of this case:

(a) 21 August 1998: The plaintiff files the writ of summons and the statement of claim.

(b) 7 September 1998: Writ of summons and statement of claim is served on the defendant.

(c) 15 September 1998: Judgment in default of appearance is taken out against the defendant (the first judgment in default).

(d) 8 December 1998: The learned SAR sets aside the first judgment in default.

(e) 11 December 1998: The plaintiff appeals against the decision of the learned SAR (the plaintiff's first appeal).

(f) 13 May 1999: The plaintiff's appeal is dismissed and the defendant is directed to file its defence within three weeks.

(g) 8 June 1999: Plaintiff's solicitors gave notice of intention to enter judgment in default against the defendant on account of its failure to file its defence (the first notice).

(h) 10 June 1999: Defendant files an application for a stay of proceedings pursuant to s 6 of the Arbitration Act 1952.

(i) 30 August 1999: Defendant's application is dismissed with costs.

(j) 24 September 1999: Defendant's solicitors inform the court that the defendant will appeal against the decision of the court.

(k) 14 October 1999: Plaintiff's solicitors again gave a notice of intention to enter judgment in default on account of the defendant's failure to file its defence (the second notice).

(l) 25 October 1999: Judgment in default is entered against the defendant for failure to file its defence (the second judgment in default).

(m) 11 November 1999: Defendant files an application to set aside the second judgment in default (encl 27).

(n) 5 April 2000: The learned SAR sets aside the second judgment in default.

The plaintiff appeals (the plaintiff's second appeal).

Findings of the court

After the defendant's application for a stay pursuant to s 6 of the Arbitration Act 1952 was dismissed with costs, the defendant appealed against the court's decision to the Court of Appeal. The court had, in the meantime, proceeded with case management and on 24 September 1999 directed that all witnesses' statements and bundles of documents be filed before the next case management date, which was fixed to 12 November 1999. It must be noted that when Mohd Saari J (as he then was) made this order on 24 September 1999, the defendant did not protest, nor ask for a stay pending the outcome of its intended appeal to the Court of Appeal even though the defendant had informed the court of its intention to appeal (see chronology of events). Even after this directive, the defendant did not file its defence. While I agree that filing a defence at this stage would have absolutely put an end to its appeal against the court's ruling in respect of its stay application pending reference to arbitration, yet there was no application to the court for a stay pending the outcome of that appeal. Even if the High Court had refused the defendant that stay, it was open to the defendant to have sought the stay from the Court of Appeal. Of course, it could not go to the Court of Appeal for a stay before exhausting its right to ask the High Court for that stay pending its appeal to the Court of Appeal. Clearly, the defendant has brought about this dilemma upon itself through its own wilful conduct in ignoring the procedural requirements. Even when the second notice to enter judgment was served on the defendant's solicitors on 14 October 1999, the defendant chose to ignore this warning. Even at this stage it failed to apply to the court of first instance for a stay pending appeal. The defendant allowed for the judgment to be taken and then filed an application to set it aside. The defendant did not dispute the receipt of

the second notice. The defendant also admitted in its affidavit in reply (encl 35) that it was cognizant of the order of court dated 13 May 1999 directing it to file the defence within three weeks from that date. It is to be noted that there was no appeal by the defendant against this decision ordering him to file the defence within three weeks from 13 May 1999. However, on 11 November 1999 the defendant filed an application to set aside the in default judgment and asked for the following orders:

(1) That the in default judgment dated 25.10.1999 be set aside.

(2) That the defendant be allowed to enter conditional appearance within two weeks from the date of the order.

(3) That if it is necessary to file a defence it be allowed to do so without prejudice to its right to go for arbitration.

The learned SAR granted the first two prayers.

I have perused the entire file. The plaintiff had not entered any appearance whether conditional or otherwise, when it applied on 10 June 1999 to set aside the earlier first judgment. As for the second application (encl 27) filed on 11 November 1997, the defendant has filed the application without even filing its conditional appearance which it ought to have done if it was relying on the arbitration clause. But as I said, the defendant has been caught in an inextricable quagmire created by its own conduct in failing to take the various steps that are provided by the Rules of the High Court. It has thus brought about its own downfall. There is an order of the court to file the defence within three weeks. That order has not been set aside. The prayer sought in encl 27 therefore cannot stand. The defendant's attempt to justify why it chose to ignore the order of the court to file the defence is unacceptable, as the defendant, apart from merely stating that it did so to protect its right to arbitration, actually took no positive step to secure the same.

The blatant disregard to an order of court, either through ignorance of the law or through wilful desire to do so, must result in the court refusing to exercise its discretion in favour of the defaulter. Orders of court must be obeyed unless a timeous application is made to stay that order. Having heard all the arguments I was satisfied that I ought to allow the appeal and to set aside the order of the learned SAR made on 5 April 2000. I entered judgment in default of defence and awarded costs to the plaintiff.

Appeal allowed.

Reported by Wong Ee Lynn